

**Montana 's**

**Workers ' Compensation  
System . . .**

*Declaration of Public Policy*

*Insurance - Who's Covered, Who's Not*

*How is Montana's Workers' Compensation  
System Administered?*

*Montana Workers' Compensation Market*

*Significant Court Cases from 2000*



## *Declaration of Public Policy<sup>1</sup>*

It is an objective of the Montana workers' compensation system to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make an injured worker whole, they are intended to assist the injured worker at a reasonable cost to the employer. Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.

A worker's removal from the work force due to a work-related injury or disease has a negative impact on the injured worker, the injured worker's family, the employer, and the general public. It is therefore, an objective of the workers' compensation system to return an injured worker to work as soon as possible after the worker has suffered a work-related injury or disease.

Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. Claimants should be able to obtain benefits speedily, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities.

Title 39, chapters 71 and 72 (Workers' Compensation Act and the Occupational Disease Act), must be construed according to their terms and not liberally in favor of any party.

It is the intent of the legislature that stress claims, often referred to as "mental-mental claims" and "mental-physical claims", are not compensable under Montana's workers' compensation and occupational disease laws. The legislature recognizes that these claims are difficult to verify objectively and that the claims have a potential to place an economic burden on the workers' compensation and occupational disease system. The legislature also recognizes that there are other states that do not provide compensation for various categories of stress claims and that stress claims have presented economic problems for certain other jurisdictions. In addition, not all injuries are compensable under the present system, as is the case with repetitive injury claims, and it is within the legislature's authority to define the limits of the workers' compensation and occupational disease system.

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<sup>1</sup> MCA 39-71-105

## ***Insurance - Who's Covered, Who's Not***

If you are an employer or an employee, the Workers' Compensation Act applies to you. An employer who has an employee in service under any appointment or contract of hire, expressed or implied, oral or written, must elect to be bound by the provisions of compensation Plan 1 (self-insured), Plan 2 (privately insured), or Plan 3 (State Fund).

### **Employment Exempted<sup>2</sup>**

The Workers' Compensation Act and the Occupational Disease Act do not apply to any of the following employments:

- ◆ Household and domestic employment
- ◆ Casual employment
- ◆ Dependent member of an employer's family for whom an exemption may be claimed by the employer under the federal Internal Revenue Code
- ◆ Sole proprietors, working members of a partnership, working members of a limited liability partnership, or working members of a member-managed limited liability company
- ◆ Broker or salesperson performing under a license issued by the Board of Realty
- ◆ A direct seller
- ◆ Employment for which a rule of liability for injury, occupational disease, or death is provided under the laws of the United States
- ◆ A person performing services in return for aid or sustenance only
- ◆ Volunteers
- ◆ Employment with a railroad engaged in interstate commerce
- ◆ An official, including a timer, referee, or judge, at a school amateur athletic event
- ◆ A person performing services as a newspaper carrier or freelance correspondent
- ◆ Cosmetologist's services and barber's services
- ◆ A person who is employed by an enrolled tribal member or an association, business, corporation, or other entity that is at least 51% owned by an enrolled tribal member or members, whose business is conducted solely within the reservation
- ◆ A jockey who is performing under a license issued by the Board of Horse Racing
- ◆ An employer's spouse
- ◆ A petroleum land professional
- ◆ An officer of a quasi-public or a private corporation or manager of a manager-managed limited liability company
- ◆ A person who is an officer or a manager of a ditch company
- ◆ Service performed by an ordained, commissioned, or licensed minister of a church
- ◆ Independent Contractors

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<sup>2</sup> MCA 39-71-401

## Life of a Claim

Accidents do happen and when a Montana worker files a workers' compensation claim, the life of that claim is dictated primarily by statute. If we were to follow the typical workers' compensation claim in Montana, its progress through the workers' compensation system would be determined by the following guidelines.

Once the injury occurs, the injured worker or their authorized representative has 30 days from the date of injury to notify the employer (employer, managing agent or superintendent in charge of the work) or the insurer. [§39-71-603, MCA]

The employer then has six days from date of notification of an injury to report the injury to the insurer or the Department of Labor and Industry. [§39-71-307, MCA, and ARM 24.29.801]

The claimant or the claimant's representative has 12 months from the date of injury to file a claim. [§39-71-601(1), MCA] The claim filing time can be extended up to an additional two years if it can be proven that the worker was somehow prevented from filing the claim because of something the employer said or did, or if the injury was latent or the worker lacked knowledge of disability. [§39-71-601(2), MCA]

The signed claim form or First Report of Injury (FROI) (form ERD-991) can be submitted to the employer or sent directly to the insurer, the adjuster or the Department of Labor and Industry. [§39-71-601(1), MCA]

The insurer/adjuster determines compensability based on descriptions of the accident provided by the employee and employer, and the time, place and circumstances of injury. This must be done within 30 days from date of receipt of the First Report of Injury. [§39-71-606, MCA]

If further investigation is needed before the insurer accepts liability and the 30 day limitation for a decision on compensability is due to expire, the insurer/adjuster might pay wage loss and/or medical benefits without such payment being an indication of admission of liability or waiver of any right of defense. [§§39-71-608 and 39-71-615 MCA]

The first 6 days or 48 hours (whichever is less) of total wage loss is not compensable but a claimant may use sick leave or vacation leave during this time. They cannot use sick leave and receive wage loss benefits at the same time. [§39-71-736, MCA]

In addition to using an emergency room or urgent care center, the claimant has the right to select the first treating physician but the insurer must then approve changes of treating physicians. The insurer has the right to deny payment for any unauthorized medical referrals and treatments. [§39-71-1101, MCA, and ARM 24.29.1510]

The physician bills the insurer/adjuster directly. Payment is made according to a fee schedule. [§39-71-704(2) and (3), MCA] The claimant is not responsible for any unpaid balance. Some insurers require that after the initial visit the claimant pay a co-payment of 20%, not to exceed \$10, for a visit to a medical service provider, or \$25 for an emergency room visit. [§39-71-704(7), MCA] The claimant is responsible for payment of any unauthorized treatment and for conditions not related to the industrial injury. [ARM 24.29.1401]

Temporary total disability (TTD) benefits are based on 66  $\frac{2}{3}$ % of the claimant's average gross wages subject to a maximum of the state's average weekly wage, and are paid bi-weekly until the claimant returns to work or has reached maximum medical improvement (MMI). [§§39-71-701 and 39-71-740, MCA] If the claimant is classified as permanently totally disabled (PTD), benefits can continue until they reach retirement age. [§39-71-710, MCA]

If, prior to attaining maximum medical improvement and due to medical restrictions, the claimant returns to work at less than the wages received at the time of injury, they may be entitled to temporary partial disability (TPD) benefits to make up the difference. Temporary partial disability is limited to 26 weeks unless extended by the insurer/adjuster. [§39-71-712, MCA]

If, after reaching maximum medical improvement, the claimant has a residual impairment, greater than zero, which is a percentage of medical impairment to the whole body, the insurer/adjuster is required to pay out the permanent partial disability (PPD) liability bi-weekly, unless the claimant requests a lump sum. All unaccrued lump sum payments must be approved by the Department of Labor and Industry. [§§39-71-703 and 39-71-741, MCA]

Other future permanent partial disability liability is typically based on age, education, loss of earning capacity, and work capacity restrictions. [§39-71-703, MCA]

If the worker is precluded from returning to the time of injury job and is suffering an actual wage loss or has an impairment of at least 15%, they are eligible for rehabilitation services. The insurer/adjuster selects a rehabilitation provider and a rehabilitation plan is established with the goal of returning the claimant to work as soon as possible. During retraining, the claimant may be eligible to receive monies from a trust fund for tuition, fees, books and other reasonable and necessary retraining expenses. They may also receive biweekly benefit payments based on their temporary total disability rate. [§39-71-1006, MCA] Financial assistance is also available for reasonable travel and relocation for training and job-related expenses. [§39-71-1025, MCA]

Unless medical benefits are closed as a condition of settlement, they may remain available for at least 60 months (5 years) from the last date of service. The insurer may not be required to furnish palliative or maintenance care after the claimant has achieved maximum medical improvement. [§39-71-704(1)(e), MCA]

## *How is Montana's Workers' Compensation System Administered?*

The Employment Relations Division provides a wide variety of services and regulation related to workers' compensation and safety.

### **Workers' Compensation Regulation Bureau**

The **Contractor Registration Unit** ensures the business has complied with workers' compensation requirements. The law provides protection from liability for workers' compensation claims for contractors who use the service of other registered construction contractors.

The **Uninsured Employers Fund Unit** ensures employers and employees are protected under the Workers' Compensation and Occupational Disease Acts. The Unit enforces coverage requirements for all employers, pays benefits to injured workers whose employers did not have workers' compensation coverage, and manages the fund from which benefits are paid.

The **Subsequent Injury Fund Unit** administers the funds that are used to offset claim costs associated with injuries to workers with disabilities. This reduces claim liability and provides an incentive for employers to hire certified workers.

The **Medical Regulations Unit** administers a program that provides an effective and equitable method of health care cost containment. Medical fee schedules are established by the unit and utilized by insurers to reimburse medical providers.

The **Carrier Compliance Unit** monitors compliance of private workers compensation carriers. The unit also licenses professional employer organizations and processes extraterritorial agreements.

The **Independent Contractor Central Unit** issues decisions on employment relationships for the Department of Revenue, Labor Standards, Unemployment Insurance, and Workers' Compensation Compliance. The unit also issues Independent Contractor (IC) Exemptions.

### **Claims Assistance Bureau**

The **Claims Unit** ensures compliance with the workers' compensation and occupational disease laws relating to benefits and claims. The unit also regulates attorney fees, administers the occupational disease panel process, and provides assistance to insurers, attorneys and injured workers.

The **Data Management Unit** enters data on new claims, tracks policy coverage, maintains the workers' compensation database system and provides a comprehensive annual report on workers' compensation to the governor and the legislature.

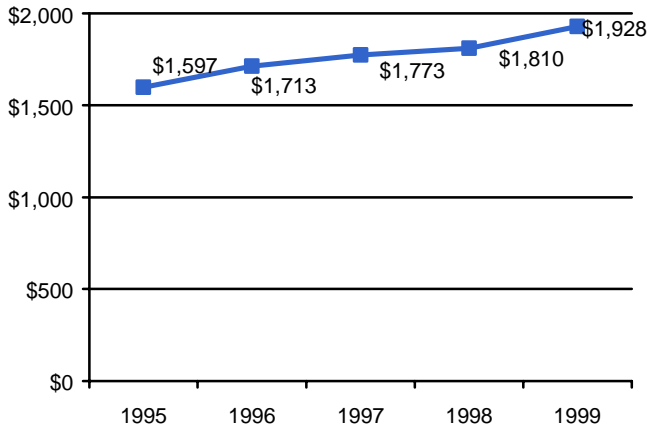
The **Mediation Unit** provides an alternative method of resolving workers' compensation benefit disputes before the dispute goes to the Workers' Compensation Court. This is a mandatory non-binding process.

### **Occupational Safety & Health Bureau**

The **Occupational Safety & Health Bureau** conducts inspections of public employers, performs on-site consultations for private employers and inspects coal mines and sand and gravel operations throughout the state. The Bureau provides safety and occupational health training for both public and private employers.

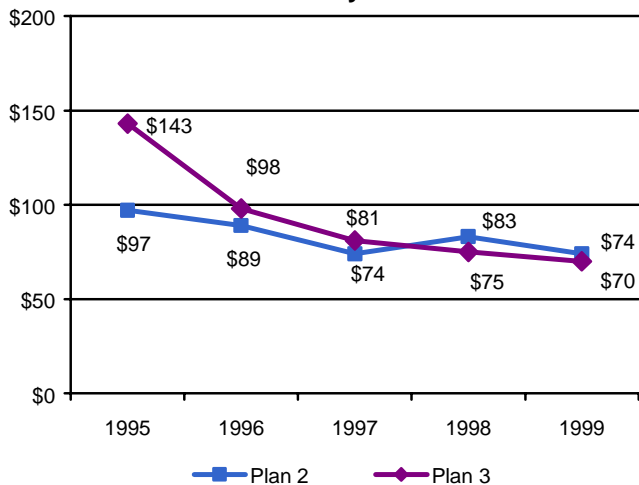
## Montana Workers' Compensation Market

**Gross Annual Payroll  
Plan 1 - by Calendar Year**



Plan 1 employers pay no premium.

**Premium Dollars  
Plan 2 & 3 - By Calendar Year**



Montana employers have several options for obtaining workers' compensation coverage for their employees.

Employers with sufficient cash reserves may qualify as self-insured (Plan 1) either individually or by joining with other employers in their industry to form a self-insured group. Montana currently has 44 individual self-insurers, 4 private groups, and 4 public groups.

Employers who do not self-insure have two options:

- They may obtain coverage with private insurance companies (Plan 2) in the voluntary market. Three hundred fifteen private insurance companies wrote workers' compensation insurance in Montana in calendar year 2000.
- They can insure through Montana's State Compensation Mutual Insurance (State Fund)(Plan 3). As the insurer of last resort, the State Fund assures all Montana employers can provide workers' compensation insurance for their employees.

The change in Montana's market share is reflected in the table below.

**Distribution of Market Share  
by Plan & by Calendar Year**

Calendar Year	1995	1996	1997	1998	1999
<b>Plan 1 – Payroll</b>	\$1,597,336,997	\$1,713,291,665	\$1,773,148,488	\$1,810,313,984	\$1,927,960,055
<b>Plan 2 – Premium</b>	\$97,572,966	\$89,893,661	\$74,615,961	\$83,274,441	\$74,142,380
<b>Plan 3 – Premium</b>	\$143,275,000	\$98,270,000	\$81,057,000	\$75,177,196	\$70,422,976



## ***Significant Court Cases From 2000***

### **HARRY DARRAH V. ASARCO, INCORPORATED**

Claimant not entitled to reinstatement of temporary total disability benefits during union strike of East Helena Asarco plant. Prior to the strike he was working in a modified position pursuant to section 39-71-701(4), MCA (1997), which provides that where the modified job is “no longer available for any reason” the worker requalifies for temporary total disability benefits. The Court previously ruled that the claimant’s unwillingness to cross picket lines did not make the job unavailable (see 1999 MTWCC 65) and trial evidence failed to establish that the job he had been performing was in fact unavailable or illusory. To the contrary, the evidence showed that claimant could have continued to work in the identical position had he crossed picket lines.

### **CHARLES FISCH V. STATE COMPENSATION INSURANCE FUND**

THOMAS FROST V. STATE COMPENSATION INSURANCE FUND

ALEXIS RAUSCH V. STATE COMPENSATION INSURANCE FUND

The claimant in each of these three cases is permanently totally disabled and seeks an impairment award in addition to the permanent total disability (PTD) benefits he is receiving.

The 1991 law applies to one claimant and the 1997 law to the other two. Under both laws, the Court is unable to find the authority for the awards. Since claimants cannot work at all, they are not permanently partially disabled (PPD) and are ineligible for impairment awards payable to PPD claimants. The 1997 law claimants are not entitled to an impairment award as provided under section 39-71-703(2), MCA, as that entitlement is for claimants suffering impairments but no wage loss, and they have suffered a wage loss. Language in section 39-71-703(1) (1991 and 1997), MCA, which authorizes PPD benefits where a worker “is no longer entitled to temporary total or permanent total disability benefits” must be read together with the further requirement that the claimant must also be PPD. Section 39-71-737, MCA, concerning concurrent and consecutive payment of benefits does not create an entitlement to an impairment award or any other new benefits, it applies only to benefits which are payable under other sections. Language authorizing payment of an impairment award upon retirement, section 39-71-710, MCA also does not create any new entitlement to an impairment award. It simply continues the liability for an impairment award due under other sections.

The Court reserved the constitutional challenge to any denial of impairment awards to PTD claimants for further briefing and argument.

### PETER R. SHERNER and DEBORAH SHERNER V. CONOCO

This is a Supreme Court appeal of a District Court ruling concerning the exclusive remedy provisions of the Workers' Compensation Act. The issue on appeal was what standard should be used to determine whether an employer's act or omission is "intentional and malicious". In this decision the Supreme Court adopts a new standard applying the plain language of the statute and the definition of "actual malice" found in § 27-2-221(2), MCA.

### **ANNETTE FLINK V. AMERICAN ALTERNATIVE INSURANCE COMPANY**

The Supreme Court reversed the decision of the Workers' Compensation Court which denied claimant's request for adjustment of her average weekly wage to include overtime hours, holding that a guarantee of overtime hours is not required. It remanded the case for determination of the number of hours which should be included. The Workers' Compensation Court held that the best measure of overtime hours is the overtime hours worked by the employee who ultimately replaced the claimant.

\* These case summaries, with the exception of the Sherner case, are taken from the Workers' Compensation Court web site found at: <http://wcc.dli.state.mt.us>. The Sherner case can be found on the Supreme Court web site at: <http://www.lawlibrary.state.mt.us>